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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 888

HARRAH'S CLUB, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7-14) is reported at 362 F. 2d 425. The Board's Decision and Order (R. 57-58, 13-50)[1] are reported at 150 NLRB 1702.

[1] "R" refers to the documents, including the Board's decision and order, contained in Volume I of the record in the court below. "Tr." refers to the transcript of testimony contained in Volume II. References designated "GCX", "RX", and "CPX" are to exhibits of the General Counsel, petitioner (respondent below), and the Union (charging party below), contained in Volume III. Only an abridged version of the decision of the Trial Examiner (R. 13-50) is reproduced in the petition (Pet. App. 17-40).

JURISDICTION

The decree of the court of appeals was filed on July 11, 1966, and on August 5, 1966, a petition for rehearing was denied (Pet. App. 1-2). On October 17, 1966, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including December 20, 1966 (Pet. 2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board reasonably exercised its discretionary authority in asserting jurisdiction over an employer who operates gambling casinos and related restaurant and entertainment facilities in the State of Nevada, where the business has annual gross receipts in excess of $500,000, and annually purchases and receives materials directly from points outside of Nevada valued in excess of $50,000.

2. Whether substantial evidence supports the Board's finding that the employer discharged an employee because of his union activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix D to the petition (pp. 41-43).

STATEMENT

A. *The Board's Findings of Fact*

1. *Petitioner's business operations*—Petitioner, a Nevada corporation with its main offices in Reno, owns and operates gambling casinos, restaurants, bars, and entertainment facilities in Reno and Stateline, Nevada. The largest operation in petitioner's complex is Harrah's Tahoe, located at Lake Tahoe in Stateline, Nevada. It contains the South Shore Room, a theatre-restaurant which accommodates 700 guests and features leading performers in the entertainment field. This case arose from the Union's [2] attempt, in August-October 1963, to organize the stage technicians who provide the technical services for stage productions in the South Shore Room (R. 14-15).

At the hearing before the Board, petitioner stipulated that, in the year preceding the events herein, it had purchased and received materials directly from points outside of Nevada valued in excess of $50,000. During the same period, its gross receipts from the sale of goods and services were in excess of $500,000. (R. 14; Tr. 321-322, 5-6.)

2. *The discharge of Wetherill*—On August 30, 1962, petitioner hired Robert H. Wetherill to run the sound console [3] in the South Shore Room (R. 37; Tr.

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[2] International Alliance of Theatrical Stage Employees and Motion Picture Operators of the United States and Canada, Local 363, AFL-CIO.

[3] The sound console is the mechanism used to regulate sound amplification for the performances in the South Shore Room (Tr. 231, 244, 618). The sound console operator places microphones at appropriate places on the stage prior to the show,

11-13). At that time, the sound console operator and the stage technicians were in different departments. The sound console operator reported directly to the Sound Engineer who constituted the Sound Department, a subdivision of the Construction and Maintenance Department. The stage and lighting technicians reported to the South Shore Room Producer, and were in the Entertainment Department, a subdivision of the Public Relations Department. About a month after hiring Wetherill, however, petitioner abolished the Sound Department, eliminated the position of Sound Engineer, and brought the operation of the sound console into the Entertainment Department.[4] (R. 43-44; Tr. 519-523; RX 4.)

Wetherill operated the sound console until he became ill in May 1963. After an absence of several weeks, he returned about May 30, and was trans-

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and then operates the console during the performance (Tr. 232, 233).

[4] Contrary to petitioner's assertion (Pet. 17), this finding does not ignore "petitioner's organizational structure." Although petitioner submitted an organizational chart dated 1961 as evidence of its departmental structure, this chart is of little relevance in determining whether a change was subsequently made. Moreover, the record shows, *inter alia*, the following: Entertainment Department Supervisor Lein informed Wetherill shortly after he was hired that the sound console had been taken over by Lein's department and that he would sign Wetherill's time slips from then on (R. 43, n. 19; Tr. 60). Herb Swartz, Sound Engineer under the prior organization, verified this, informing Wetherill that the sound console operator now belonged in the Entertainment Department and that its supervisors would give him orders and sign his time slips (Tr. 922-924); and, thereafter Wetherill's time slips were in fact signed by Entertainment Department supervisors (R. 43, n. 19; Tr. 932-934; CPX 3).

ferred, at his request, to a job as a stage technician (R. 37; Tr. 11-12, 45-47).[5] Early in June, Wetherill became an unsalaried business agent for the Union and notified petitioner of his position (R. 37; Tr. 10, 14, 389, 554, 705, 616, 641).

On August 9, 1963, Wetherill informed petitioner that he had organized a majority of the stage technicians, and demanded that petitioner recognize the Union. Petitioner did not respond to the request, and, on August 14, Wetherill filed a petition for a representation election with the Board (R. 16; Tr. 19-22). Several supervisors immediately approached Wetherill, inquiring why he had not informed them of his organizing activity, and threatening that the advent of the Union would mean a reduction in staff (R. 16; Tr. 24-27). Supervisor Lein informed one employee that management "wouldn't trust Bob Wetherill anymore" because Wetherill had "stabbed them in the back" (R. 16-17; Tr. 76-77).

On August 30, Producer Barkow telephoned Charles Walker at his home, requesting that he report for work immediately and apologizing for cutting his vacation short.[6] Walker asked if something

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[5] Petitioner asserts (Pet. 18) that the "evidence was that [Wetherill] was not transferred but was hired in as a new employee." However, the record shows that Wetherill was transferred at his request (Tr. 11-12, 45-47), and that he was still on the payroll during his illness (Tr. 106, 35-36).

[6] Walker, a former stagehand, had been drafted into the Armed Forces. Upon his discharge, early in August, petitioner had offered him his old job as a stage technician, but both agreed that he would not report for work until September 4 (R. 46; Tr. 177-178).

had happened, or "if somebody had broken a leg." Barkow admonished him to keep his "mouth shut," and added that they would talk later (R. 46; Tr. 178). Walker arrived at the Club on August 31 and started work the following day (Tr. 170-171).

On September 1, petitioner discharged Wetherill, ostensibly "To make room for a man coming out of the service" (R. 38; Tr. 29).[7] Immediately after Wetherill's discharge, petitioner embarked on a vigorous anti-union campaign,[8] coercively interrogating employees about their union activities, threatening them with reprisals if the Union came in, and soliciting them to withdraw from the Union.[9] Despite

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[7] Walker had seniority over Wetherill in the Entertainment Department. However, if, as shown above (p. 4), Wetherill was attached to that department shortly after he was initially employed on August 30, 1962, rather than when he became a stagehand on May 31, 1963, he had seniority in that department over employees Jordan and McNerthney, both of whom were retained, in preference to Wetherill, when Walker returned to work (R. 41-43).

Moreover, although Entertainment Director Vincent had repeatedly stated that the stage crew was overstaffed, no steps to reduce the size of the crew were taken prior to the advent of the Union. Indeed, early in August 1963, in a discussion about the possible effect upon the stagehands of the new Wage-Hour Law, Producer Barkow told stage technician Lovelady that petitioner was faced with the alternative of scheduling a seven-hour day, six-day work week, or hiring three additional stagehands, to avoid payment of overtime (R. 47; Tr. 79-80).

[8] Two days after Wetherill's discharge, his former supervisor, Swartz, told employee Jordan that Wetherill "had had his neck stuck out a mile because of the union business" (R. 46).

[9] The Board found more than 20 individual incidents where petitioner interfered with, restrained or coerced employees

this campaign, the Union won the Board-conducted representation election (R. 15; GCX 2(c)). Shortly thereafter, Entertainment Director Vincent informed an employee that he would "never forget and forgive" Wetherill for doing "this thing to us," adding that it was "the same thing as if I had invited him into my house and he [sedueed] my wife" (R. 26; Tr. 106).

B. *The Decisions Below*

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that petitioner's business operations affected interstate commerce within the meaning of the Act (R. 14, 47, 57). The Board further concluded that petitioner had restrained and coerced its employees in violation of Section 8(a)(1) of the Act (see n. 9, p. 6, *supra*), and had discharged Wetherill because of his union activities in violation of Section 8(a)(3) and (1) (R. 35, 48, 57). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to reinstate Wetherill with backpay (R. 48-50, 58).

The court of appeals sustained the Board's findings and enforced its order in full (Pet. App. 7-14).

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in the exercise of their statutory rights in violation of Section 8(a)(1) of the Act (R. 36-37). The court of appeals sustained these findings (Pet. App. 10), and petitioner does not contest them here.

ARGUMENT

1. In view of petitioner's annual purchases of materials and supplies in excess of $50,000, directly from points outside of the State of Nevada, it is clear that its operations are subject to the Board's legal jurisdiction. See *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224.[10] Moreover, although the Board has discretion to decline to exercise the full measure of its legal jurisdiction and has formulated certain standards to guide the exercise of that discretion,[11] the assertion of jurisdiction was in accordance with the applicable standard.[12] Petitioner

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[10] Petitioner does not seriously suggest otherwise (cf. Pet. 11). Indeed, petitioner's answer to the Board's complaint did not contest the allegation that petitioner's operations affected commerce within the meaning of the Act (R. 5-III, 9-10, 14).

[11] Section 14(c)(1) of the Act provides that:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

[12] The Board has asserted jurisdiction over gambling casinos and their related restaurant and other facilities where, as here, the annual gross receipts equal or exceed $500,000 and the annual interstate purchases exceed $50,000. *El Dorado Club*, 151 NLRB 579; *Hotel Tropicana*, 159 NLRB No. 105; *Thunderbird Hotel*, 152 NLRB 1416; *Thunderbird Hotel*, 144 NLRB 84; *Landrum Mills Hotel Corporation*, 144

contends, however, that it should nevertheless be free of the Act's regulation because the Board has declined to assert jurisdiction over racetracks and their related activities, and this difference in treatment is so arbitrary as to constitute a violation of the due process clause of the Fifth Amendment (Pet. 6-16). The court below properly rejected this contention.

Although both racetracks and gambling casinos are subject to extensive state controls and have other local ties, the fact remains that each involves a distinct and different "class or category of employers" (Section 14(c)(1), n. 11, p. 8, *supra*). Moreover, the Board first decided to decline jurisdiction over racetracks in 1950 (*Los Angeles Turf Club*, 90 NLRB 20), when its budget was more limited than it was in 1963, when the question of asserting jurisdiction over gambling casinos and their related operations first arose.[13] And, although racetracks have restaurant facilities, the connection between casinos and other facilities (*e.g.*, hotels, restaurants, and entertain-

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NLRB 754; *Harrah's Club*, 143 NLRB 1356, enforcement denied on other grounds, 337 F. 2d 177 (C.A. 9).

[13] The first case in which the Board asserted jurisdiction with respect to gambling casinos also involved petitioner's operations; petitioner did not there contest the Board's assertion of jurisdiction. *Harrah's Club*, 143 NLRB 1356, 1357, 1360, enforcement denied on other grounds, 337 F. 2d 177 (C.A. 9).

The Board's continued declination to overturn its prior decision on racetracks does not, of course, undermine the relevance of these historical considerations. *Walter A. Kelley*, 139 NLRB 744; cf. *Radovich* v. *National Football League*, 352 U.S. 445, with *Toolson* v. *New York Yankees*, 346 U.S. 356.

ment) over which the Board would assert jurisdiction independently is generally closer and more pervasive.[14] For these reasons, among others, the Board's policy of asserting jurisdiction over gambling casinos and related facilities in that industry, while declining to do so in the racetrack industry, is not discriminatory in the constitutional sense. See *Currin* v. *Wallace*, 306 U.S. 1, 14; *McGowan* v. *Maryland*, 366 U.S. 420, 426; *Norvell* v. *Illinois*, 373 U.S. 420, 424; *Employing Lithographers of Greater Miami, Florida* v. *National Labor Relations Board*, 301 F. 2d 20, 24-27 (C.A. 5).

In addition, since the Board clearly had legal jurisdiction over petitioner's operations, petitioner has no property or other cognizable legal right to be free of the Act's sanctions with respect to its unfair labor practices. The Board's policy of asserting less than the full measure of its statutory jurisdiction is intended to enable the Board to conserve its budget and manpower, and not to furnish private parties with a guarantee of immunity from the Act's obligations. See *Lucas County Farm Bureau* v. *National Labor Relations Board*, 289 F. 2d 844, 845-846 (C.A. 6), certiorari denied, 368 U.S. 823; *National Labor Relations Board* v. *Stoller*, 207 F. 2d 305, 307 (C.A. 9), certiorari denied, 347 U.S. 919. Thus, even if, contrary to our argument above, there were no relevant differences between racetracks and gambling casinos, petitioner has shown, at most, that the Board erred

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[14] See e.g., *Thunderbird Hotel*, 144 NLRB 84; *Landrum Mills Hotel Corp.*, 144 NLRB 754.

in declining jurisdiction over racetracks and not that petitioner's casino must be exempted. This does not establish a denial of due process as to petitioner.

2. Petitioner also contends that, in affirming the Board's conclusion that Wetherill was discharged because of his union activities, the court of appeals "gave mere lip service" (Pet. 2) to the substantial evidence rule. That contention raises a purely evidentiary issue which does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the facts summarized in the Statement (pp. 3-7, *supra*), and the careful analysis of the record reflected in the opinion of the court below (Pet. App. 11-14), show that the Board was fully justified in finding that petitioner discharged Wetherill because of his union activities, and that the court below properly performed its reviewing function in sustaining that finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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